



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 898 of 2009

ELIZABETH OUMA.....PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION....DEFENDANT

RULING

This application is brought by a Chamber Summons dated 14th December 2009, and taken out under **Order XXXX Rules 1,2,3 and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 52 of the ITPA 1882 and Section 100 of the Banking Act.** The Applicant seeks orders that –

1. ...spent
2. That pending determination of this suit, a temporary injunction be issued restraining the Defendant, its agents or servants, Advocates or auctioneers or any other person acting for and or on its behalf from advertising for sale, disposing off, selling by private treaty or otherwise howsoever charging, leading, (*sic*) letting or otherwise howsoever, interfering with the Plaintiff's possession, occupation, use and or ownership of Land Reference Number 209/6068/4 Nairobi or until further orders of this court.
3. An order be made under section 52 of the Transfer of Property Act 1882 of India (Amended) that during the pending of this ALL (*sic*) FURTHER REGISTRATION or charge of registration in the ownership, leasing, subleasing, allotment, user occupation or possession or in any kind of right, title or interest in ALL THAT parcel known as LR No. 209/6068/4 Nairobi with any Land Registry, Government Department be prohibited.
4. A declaration that no proper Accounts have since been rendered by the Defendant in reference to the loan account and the said Defendant be ordered to render accounts from inception of the loan to date.
5. Costs of this application be provided for.

The application is supported by the annexed affidavit of ELIZABETH OUMA, the Plaintiff herein, and is based on the following main grounds –

- (a) That at all material times relevant to this suit the said suit property belongs to the plaintiff who is in possession, occupation and use.
- (b) That no statutory notice was ever served upon the plaintiff prior to the advertisement.

- (c) That no Redemption Notice was ever served by the Auctioneers (45 days notice).
- (d) That there was no valid statement of account held by the Defendant.
- (e) That the Plaintiff is apprehensive that unless the orders sought are granted, her aforesaid property may be disposed off occasioning her more loss.
- (f) That the plaintiff's suit will be rendered nugatory and a pure academic exercise unless the orders sought are granted.
- (g) That the plaintiff will suffer greater prejudice if the orders sought are not granted.

In opposition to the application, Mr. VINCENT H.L. OPANGA, the Special Projects Manager of the Defendant, swore an affidavit filed on 29th January 2010. In that affidavit, the Deponent avers that for the purpose of enabling the Defendant to exercise more readily and beneficially its statutory power of sale, the plaintiff irrevocably appointed the Defendant to be its Attorney, and in that capacity to execute and do all such deeds, acts and things as may be expedient for the full exercise of the Defendant's statutory power of sale. Prior to advertising the subject property for sale, the said property was valued and a report and valuation thereof dated 17th November 2009 was prepared by Messrs. Crystal Valuers Limited who are duly Registered valuers. The plaintiff's loan account herein attracted an interest of 3%, 5% and later on at 8% throughout the loan period and always in accordance with the strict terms of the Loan Agreement as well as the applicable version of the Defendant's Staff Code of Regulations. The plaintiff does not deny that she defaulted in her obligation to repay the loan herein to the Defendant, and that she is using the issue of reconciliation of her loan account as a manoeuvre to make her escape her obligation to repay the loan amount. The deponent finally attests that the Defendant had complied with the provisions of the law prior to commencing the process of auction.

With leave of the court, the parties to the suit herein filed their written submissions. Having considered the pleadings and the written submissions of the respective parties, I take the view that the main issue for determination is whether the Applicant has made out a case to warrant an interlocutory injunction pending the determination of the suit.

The principles governing to the grant of interlocutory injunctions were well settled in **GIELLA v. CASSMAN BROWN LIMITED [1973] E.A. 358**. **Firstly, the Applicant must establish a prima facie case with a probability of success. Secondly, an injunction will not normally be issued unless it can be shown that the Applicant is likely to suffer irreparable injury that cannot be adequately compensated in damages. Thirdly, if the court is in doubt, then the court will decide an application on a balance of convenience.**

It is noteworthy that whereas the Applicant denies in her supporting affidavit that she was served with a notification of sale, a reading of her letter dated 17th August, 2004 shows that she acknowledged the receipt of the same. In the said letter, she expresses her willingness to pay off the loan. In a nutshell, the Applicant does not deny her indebtedness. I also note from her written submissions that the Applicant denies any arrears in the mortgage account as alleged by the Respondent. These are serious contradictions.

From the above observations, I agree with counsel for the Respondent that the Applicant consciously offered the suit property as security. Consequently, I find the Applicant's argument that the loss of her property cannot be compensated in damages unconvincing. She has not brought before the court sufficient material to sustain the grant of the prayers sought. She is dealing with a well established financial institution, and if the suit property is irregularly or unlawfully disposed off, the Respondent would be in a position to fully compensate her. As a result she would not suffer any irreparable injury which cannot be adequately compensated by an award of damages. If I was in doubt, I would still find that the balance of convenience tilts in favour of the Respondent since the interest keeps accruing and may soon escalate to a point where the amount of the debt payable exceeds the value of the security. In such a situation the Applicant would lose her property and yet the Respondent would not have been fully paid. Both parties

would therefore end up being losers.

Consequently, I am not satisfied that the Applicant has established a prima facie case with a probability of success. On the contrary, I find that she is not entitled to an injunction pending the hearing and determination of the suit.

This application is accordingly dismissed with costs.

It is so ordered.

L. NJAGI
JUDGE

DATED and **DELIVERED** at **NAIROBI** this 20th day of November, 2012

MUTAVA
JUDGE